



STATE OF IDAHO  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

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C.L. "Butch" Otter, Governor  
John H. Tippetts, Director

July 15, 2016



**Sent Via U.S. Mail**

Regional Freedom of Information Officer  
U.S. EPA, Region 10  
Office of Ecosystems, Tribal and Public Affairs  
1200 ▪ 6<sup>th</sup> Avenue ETPA-124  
Seattle, WA 98101

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

U.S. Environmental Protection Agency  
Office of Water (4301T)  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**Re: *Freedom of Information Act Request – Human Health Criteria in  
Idaho's Water Quality Standards***

Dear Sir/Madam:

Pursuant to the Freedom of Information Act, 5 U.S.C. Section 552, and 40 CFR 2.100 through 2.108, the Idaho Department of Environmental Quality (IDEQ) requests copies of the records maintained by the Environmental Protection Agency (EPA) listed below. Please do not provide documents already submitted by EPA to IDEQ during the Idaho rulemaking regarding human health criteria for toxic pollutants that were adopted by the Idaho Board of Environmental Quality in 2015 (Idaho HHC):

1. Any documents relied upon or reviewed by EPA in developing "EPA Comments on Idaho Department of Environmental Quality's (DEQ) October 7, 2015 Proposed Rule Revisions to Idaho's Human Health Criteria for Toxics, Docket No. 58-0102-1201, November 6, 2015".

2. Any documents relied upon or reviewed by EPA with respect to the following comments included in “EPA Comments on Idaho Department of Environmental Quality’s (DEQ) October 7, 2015 Proposed Rule Revisions to Idaho’s Human Health Criteria for Toxics, Docket No. 58-0102-1201, November 6, 2015”:
  - a. Page 6: “Thus, in order to protect the applicable fishing designated uses in areas where such rights apply, as informed by the treaty-reserved right to continue legally protected culturally important subsistence fishing practices, the state must consider the tribal population exercising their reserved fishing rights in Idaho as the target general population for the purposes of deriving criteria that will protect the subsistence fishing use and allow the tribes to harvest and consume fish consistent with their reserved rights.”
  - b. Page 6-7: “The data uses to determine a FCR must reasonably represent tribal subsistence consumers’ practices that reflect consumption unsuppressed by fish availability or concerns about the safety of available fish.”
3. Documents relied upon or reviewed by EPA in developing the following statement in EPA’s proposed Revision of Federal Water Quality Criteria Applicable to Washington, 80 FR 55063 (Monday, September 14, 2015): “The treaties themselves could be interpreted to require a certain level of risk; e.g., a de minimis level of risk that would most reasonably approximate conditions at the time the treaties were signed and the fishing rights were reserved.” 80 FR at 55068.
4. Any documents that relate to or were used in the development of or support the following statement in EPA’s January 2013 “Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions”: “It is also important to avoid any suppression effect that may occur when a fish consumption rate for a given subpopulation reflects an artificially diminished level of consumption from an appropriate baseline level of consumption for that subpopulation because of a perception that fish are contaminated with pollutants.”
5. Any documents that relate to or were used in the development of or that support EPA’s policy that States must consider tribal reserved rights, including tribal treaty-reserved fishing rights, when States develop HHC for toxic pollutants. This policy was expressed in EPA’s comment letters to the Idaho Department of Environmental Quality regarding the Idaho HHC dated May 29, 2015, August 21, 2015 and November 6, 2015 and in EPA’s comment letter regarding WA HHC, dated March 23, 2015.
6. Any communications between EPA and representatives or members of Idaho Tribes (including the Shoshone-Bannock Tribes, the Nez Perce Tribe, the Coeur d’Alene Tribe, the Kootenai Tribe of Idaho, the Columbia River Inter-Tribal Fish Commission and the Upper Snake River Tribe Foundation) from 2011 to the present regarding the selection of a cancer risk rate and/or a fish consumption rate in the development of the Idaho HHC.



7. The Exposure Assessment TSD cited to in the Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000). IDEQ understands this document was never finalized, and would like a copy of the draft of the document as it existed in 2000, as well as any subsequent revisions of the document.

#### Request for Fee Waiver

Pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 40 CFR 2.107(l), IDEQ requests EPA waive the fees associated with responding to IDEQ's request for records because disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of IDEQ.

**40 CFR 2.107(l)(2)(i): The subject of the Request.** The documents requested relate to the operations or activities of EPA because the documents all relate to EPA's review, approval or disapproval of State adopted water quality criteria for the protection of human health pursuant to section 303 of the Clean Water Act and the development and promulgation of such water quality criteria by EPA. Further, the documents requested relate to the standard used by EPA in taking actions regarding State adopted water quality criteria for the protection of human health and the development and adoption of such criteria by EPA. IDEQ also seeks information regarding communications with Idaho Tribes regarding the Idaho HHC. This information relates to the manner in which EPA makes decisions regarding human health criteria under section 303 of the CWA, and specifically, the potential influence of the Tribes on the EPA decision making process.

**40 CFR 2.107(l)(2)(ii): The Informative Value of the Information.** The documents requested are meaningfully informative about EPA's actions regarding water quality criteria for the protection of human health because the documents will show the basis for the positions EPA has taken in reviewing Idaho and other State human health water quality criteria as well as positions set forth by EPA in documents EPA has published regarding water quality criteria for the protection of human health. As noted in the requests for information above, EPA has repeatedly informed Idaho and other States and the public that the States "must" use certain data and "must" consider certain factors, such as tribal subsistence fish consumption unsuppressed by the availability of fish or concerns regarding the safety of available fish. Yet, in making these demands and taking these positions in various documents, EPA has provided Idaho, other States and the public with little to no supporting information or records. IDEQ, other State regulatory agencies and the public in general have a right to understand the standard EPA is using and will use to review and otherwise take action with respect to water quality criteria for the protection of human health under the Clean Water Act. The requested information will, therefore, be meaningfully informative.



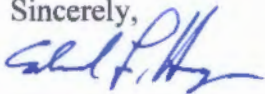
Information regarding communications with the Tribes will also be meaningfully informative. As the courts have stated: “[a]n understanding of how a federal agency makes policy decisions, including the influence of any outside groups on this process, is also important to the public’s understanding of the government.” Forest Guardians v. U.S. Dept. of Interior, 416 F.ed 1173, 1179 (10<sup>th</sup> Cir. 2005); Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1313-14); NRDC v. EPA, 581 F. Supp.2d 491, 498 S.D.N.Y (2008). The information requested will help inform IDEQ and the public regarding the influence of the Tribes on EPA’s decision-making process – what, if any, promises and commitments EPA has made to the Tribes concerning the outcome of EPA’s review of the Idaho HHC. The information regarding the tribal communications is, therefore, meaningfully informative.


**40 CFR 2.107(l)(2)(iii) and (iv): The Contribution to an Understanding of the Subject by the Public, and the Significance of the Contribution.** The documents requested will contribute significantly to the public’s understanding of EPA’s actions with respect to water quality criteria for the protection of human health. IDEQ was created with the sole mission of protecting human health and the environment. Idaho Code section 39-102A. As part of this mission, IDEQ is obligated to develop Water Quality Standards, including human health water quality criteria, that fully meet the goals and requirements of the Clean Water Act. Under the Idaho Administrative Procedures Act, Idaho Code sections 67-5201 through 67-5292, IDEQ must engage whenever possible in a negotiated process to develop rules, including Water Quality Standards. This negotiated process includes providing the public with draft rules and information relevant to the subject matter of the rulemaking, and allowing the interested public with an opportunity to participate in the rulemaking process by attending meetings and providing oral and written comments. IDEQ uses a very transparent process, and continues to post information on its website relevant to the rules both during and after the rulemaking to ensure the public is informed. The development of the Idaho HHC that is the subject of this request followed a three year negotiated rulemaking process with numerous meetings per year, and a process in which IDEQ published on its website information regarding every issue and aspect of the development of the human health criteria to ensure the public was informed. The public was very involved and interested in the issues, particularly the issue of the fish consumption rate used in the development of the criteria. The meetings were very well attended, and IDEQ received numerous comments. IDEQ continues to maintain and update this website, which can be accessed <http://www.deq.idaho.gov/laws-rules-etc/deq-rulemakings/>. The website demonstrates the public interest in the issues that are the subject of this FOIA request as well as IDEQ’s dissemination of information to the public. The information requested will be posted on IDEQ’s website. When information of this sort is posted, IDEQ sends a notice to interested parties, in this case at least all those who participated in the negotiated rulemaking process, of the availability of the information. Therefore the documents will be available to the public.

The information provided pursuant to this request will help the public, IDEQ and other States better understand the standard EPA uses to judge human health water quality criteria, the process EPA uses and the interaction with and influence of Idaho Tribes on this process. EPA has provided little or no basis for the comments, demands and positions with respect to which IDEQ has requested information. In addition, IDEQ and the public have not had access to communications with the Idaho Tribes and this information may disclose the influence of the Tribes on EPA's review of Idaho HHC. In sum, the information requested will significantly contribute to the public's understanding of EPA's actions regarding human health criteria under the Clean Water Act.

**40 CFR 2.107(l)(3). The disclosure of the information requested is not primarily in the commercial interest of IDEQ.** IDEQ is a public agency with its sole mission the protection of public health and the environment. IDEQ has no commercial interest that will be promoted by the release of the requested information.

Sincerely,



 Barry N. Burnell  
Water Quality Division Administrator

BNB:dls